[Dated March 6, 1996]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY GRACIA,	)	
	)	No. 87 C 10005
Plaintiff,	)	
v.	)	Judge
	)	Paul E. Plunkett
VOLVO EUROPA TRUCK,	)	
N.V., a foreign corporation,	)	Magistrate Judge
	)	Rebecca R. Pallmeyer
Defendant.	)	

REPORT AND RECOMMENDATION

On August 12, 1987, Plaintiff Nancy Gracia was a passenger in a 1986 Volvo FE6/1.3 truck ("Volvo truck") when it struck the rear of another vehicle being operated in the same direction on the Kennedy expressway. As a result of the accident, Plaintiff was thrown from the vehicle and sustained serious injuries. Plaintiff has brought this action under the court's diversity jurisdiction against Defendant Volvo Europa Truck, N.V. ("Volvo"), the manufacturers of the Volvo truck. Plaintiff claims that the windshield retention system on the Volvo truck is inadequate to prevent the windshield from ejecting during foreseeable impacts. Defendant Volvo has moved for summary judgment, arguing that Plaintiff's strict liability claim is preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, which provides that whenever a federal motor vehicle safety standard is in effect, no non-identical state safety standard is applicable. Volvo urges that where there is a federal standard governing windshield retention require-

ments, any differing state standard, including one imposed by the imposition of liability under common law, conflicts with the federal standard and is thus preempted. Because the safety standard at issue is not applicable to the Volvo truck involved in this case, this court recommends that Defendant's motion for summary judgment be denied.

DISCUSSION

Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). For purposes of this motion, there are no disputes of fact: the parties agree that Plaintiff flew out of the cab of the Volvo truck at the time of impact. The issue here is whether Plaintiff's tort claim against Volvo is preempted by federal law.

Under the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, Congress has the power to preempt state law. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Federal preemption of state law can occur in three situations: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; and (3) where preemption is implied because there is an actual conflict between federal and state law. *Schneidewind v. ANR Pipeline Co.*, 485 IJ.S. 293, 300 (1988). In determining whether federal statutes or regulations preempt state law, the court's "sole task is to ascertain the intent of Congress," *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280 (1987), exercising a

presumption against preemption. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). In this case, Defendant Volvo argues that Plaintiff Gracia's claims are preempted expressly and by implication. The court will address these arguments turn.

Express Preemption

Congress' express purpose for enacting the National Traffic and Motor Vehicle Safety Act ("Safety Act") was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve this purpose, the Act delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS") that provide practical and objective minimum standards for the performance of motor vehicles and their equipment. *Id.* §§ 1391(2), 1392(a). The Secretary, in turn, has delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). *See* 49 C.F.R. § 501.2. Section 1392 of tile Safety Act mandates that state law may not establish a safety standard that differs from the FMVSS[1] standards. The Act also contains a saving clause, however, which provides that compliance

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[1] The relevant provision states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal Standard. 15 U.S.C. § 1392(d).

with the applicable federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

FMVSS 212, as promulgated by the NHTSA, "establishes windshield retention requirements for motor vehicles during crashes." 49 C.F.R. § 571.212.S1.[2] This standard applies to the following motor vehicles:

> Passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

49 C.F.R. § 571.212 S3. It is undisputed that the Volvo truck in which Plaintiff was injured is excluded from FMVSS 212; it weighs more than 10,000 pounds and is a forward control vehicle. (Defendant's 12(N4) Statement 1 34.) Volvo contends, nevertheless, that § 1392(d) of the Safety Act expressly preempts Plaintiff's common law

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[2] For vehicles that fall within the coverage of Standard 212, the NHTSA prescribes that when the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified below:

> *Vehicles equipped with passive restraints.* Vehicles equipped with passive restraint systems shall retain not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.
>
> *Vehicles not equipped with passive restraints.* Vehicles not equipped with passive restraint systems shall restrain not less than 75 percent of the windshield periphery.

action. (*See* Volvo's Reply to Plaintiff's Response to Motion for Summary Judgment Based on Federal Preemption (hereinafter "Volvo's Reply"), at 2.) Volvo reasons that, by exempting the subject vehicle from the requirements of Standard 212, the NHTSA expressed an intention that no standards should be placed upon the subject vehicle with respect to windshield retention. According to Volvo, exposure to possible liability under state common law has the effect of setting up a state standard which is contrary to the federal standard because, as Volvo urges, "where the common law standards address product safety, then they are 'safety standards', in ordinary, accepted usage." (Volvo's Reply, at 6.)

In Volvo's view, NHTSA's affirmative decision to exclude the subject vehicle from FMVSS 212 operates as an express preemption of state tort law in the area of windshield bonding. (Volvo Europa Truck, N.V.'s Memorandum of Law in Support of Motion for Summary Judgment Based on the Doctrine of Federal Preemption (hereinafter "Defendant's Memorandum"), at 7.) The Supreme Court has held that "[a] federal decision to forego regulation in a given area may imply the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." *Arkansas Elec. Co-op Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375 (1983); *see also Freightliner Corp. v. Myrick,* 115 S. Ct. 1483 (1995).[3] Before the court will draw such a con-

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[3] Any discussion of the preemptive effect of a Congressional decision *not* to regulate would seem to fall squarely under the heading of "Implied preemption." Nevertheless, the Supreme Court in *Myrick* clearly considered the issue as part of its discussion of express preemption. 115 S. Ct. at 1487. This court will do the same.

clusion, however, the federal agency's failure to regulate must "take on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the [federal] statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

In the present case, the administrative history surrounding FMVSS 212 does not adequately demonstrate that the NHTSA's exemption of certain trucks from the regulation expressed the agency's determination that state common law claims should be preempted. The agency had in fact proposed to amend FMVSS 212 to include the excluded vehicles in 1969. (See Windshield and Forward-Facing Window Requirements, Docket No. 69-29, Notice 2, Ex. 6 to Defendant's Memorandum (hereinafter "AMA Comments").) In response to this proposal, the Automobile Manufacturers Association, Inc. ("AMA") submitted comments expressing the view that preserving the windshield opening as a means of escape after an accident in the heavier trucks (10,000 lbs. or more) "*may* outweigh the advantages that could be derived from increased windshield retention in such vehicles." (*Id.* at S70-3.4 (emphasis added).) In addition, the AMA stated in its comments to the NHTSA that because of the characteristics of forward-control vehicles,[4] "in many accidents . . . either the windshield is contacted by the object struck or the impact results in substantial deformation of the mounting structure. In either event specifying a windshield retention capability would be meaningless." (*Id.* at S70-3.5.)

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[4] In a "forward control" vehicle, the cab sits up on top of the engine and the windshield is generally flush with the front bumper. See 49 C.F.R. § 571.3(b).

The AMA did note that the retentive capability of a windshield could provide benefit to passengers, simply because passengers do not have a steering wheel in front of them to hold them in place. (AMA Comments, at S70-3.3.) The AMA asserted, however, that the presence of a passenger in heavier vehicles is less frequent than in multipurpose passenger vehicles and lighter trucks. The AMA premised this belief on data which indicated that in a number of injury-producing accidents involving larger vehicles, there was only one occupant—the driver. (*Id.* at S270-3.3 to -3.4.)

While it is clear from the administrative history that the NHTSA relied on the AMA's comments in deciding not to extend the scope of the windshield standards, see e.g., 37 Fed. Reg. 16,980 (1972) ("It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield itself, or deform the windshield mounting"). It is not clear to what extent those comments controlled the decision. In any event, the AMA submission contained only one comment suggesting that increased windshield retention would further the risk to safety-an accident victim's need to escape through the window. This court cannot conclude, on the basis of this one comment, that the NHTSA affirmatively decided that any regulation in this area would be harmful. A more reasonable reading of the regulatory history suggests that the decision to forego regulation of these larger vehicles stemmed from a lack of data demonstrating that an extension of the standard was necessary.

Viewed in this light, the decision to forego regulation here is not significantly different from the NWSA decision under scrutiny in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), a case cited by Volvo in support of its express preemption argument. (See Volvo's Reply, at 1.) In *Myrick*, a consolidation of two essentially identical cases, a truck manufactured by each defendant jackknifed and collided with an oncoming plaintiff, allegedly as a result of the defendants' failure to install anti-lock braking systems ("ABS"). 115 S. Ct. at 1485. The defendants argued that the plaintiffs' claims were expressly preempted by the NHTSA's decision to exclude the vehicles at issue from FMVSS 121, a standard which effectively required the use of ABS on trucks with air brakes. *Id.* at 1486. The Safety Administration had amended FMVSS 121 after the Ninth Circuit suspended the standard due to lack of sufficient evidence to demonstrate that ABS would not create greater dangers than it sought to avoid. *See Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). Rejecting the defendants' argument that the absence of regulation itself constituted preempting regulation, the *Myrick* Court stated:

> Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by [the FMVSS] should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a

> federal court that the agency had not compiled sufficient evidence to justify its regulations.

Myrick, 115 S. Ct. at 1486. Volvo argues that *Myrick* is distinguishable from and in fact supportive of its argument in the instant case, because the administrative history "makes it clear that the NHTSA made an affirmative decision" not to subject vehicles like the Volvo truck to FMVSS 212. (Defendant's Memorandum, at 4-6.) This court recognizes a distinction, however, between an exemption from regulation on the one hand, and, on the other, a decision that state claims are barred. The fact that the NHTSA chose to leave the windshield retention system of the Volvo truck uncovered by its regulation does not require the conclusion that the NHTSA intended the Safety Act to preclude Plaintiff from bringing a common law claim of strict liability. Indeed, the NHTSA decision here apparently stems, similarly, from the lack of sufficient evidence to justify the regulation.

Volvo's arguments to the contrary, then, the NHTSA did not decide that the minimum standard required of these vehicles "should be the absence of all standards, both federal and state." *Myrick*, 115 S. Ct. at 1487. See also *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. MDI—991, 1995 WL, 683854, at *7 (E.D. La. Nov. 13, 1995) (rejecting defendant's argument that NHTSA's failure to propose anti-rollover stability standards preempted state regulation; the court finds it "difficult to see how the language, legislative history, and purpose of the Safety Act, considered in conjunction with the Agency's explanations for foregoing . . . regulation . . ., can be viewed as a definitive standard prohibiting any and all regulation . . . ."). Because there is no clear and manifest evidence that Congress intended to preempt Plaintiff's

common law claim, this court finds that such claim is not expressly preempted.[5]

Implied Preemption

If the court concludes that Plaintiff's claim is not expressly preempted, Volvo argues the court should find the claim preempted by implication. Federal law preempts a conflicting state law by implication where compliance with both the federal and the state regulations is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (no conflict preemption where it was not impossible for avocado growers to comply with federal standards gauging maturity of avocados by oil content, as well as state standards which gauged maturity based on picking dates), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Myrick*, 115 S. Ct. at 1487. Volvo reasons that the possibility of common law liability "would force Volvo to comply with state law tort theory regarding windshield retention requirements when a federal agency has already affirmatively eliminated any such requirement." (See Defendant's Memorandum, at 8.) Volvo further argues that the purposes of the Safety Act

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[5] Having found that no federal standard exists with respect to vehicles over 10,000 pounds or having a forward-control configuration, the court need not address Plaintiff's argument that the express preemption clause applies only to standards promulgated by the state, and not common law claims. (Plaintiff's Memorandum in Response to Motion for Summary Judgment Based on Federal Preemption, at 3; Volvo's Reply, at 6-8.) See *Myrick*, 115 S. Ct. at 1487 n.3.

would be frustrated if common law standards of care were permitted to dictate a vehicle manufacturer's behavior. (*Id.* at 8.)

As a preliminary matter, the court notes that Volvo is not precluded from arguing implied preemption simply because the Safety Act includes an express preemption clause.[6] Courts addressing the issue of federal preemption prior to 1992 routinely considered arguments of implied preemption, regardless of whether an express preemption clause existed in the relevant statutory scheme. See, e.g., *Pokomy v. Ford Motor Co.*, 902 F.2d 1116, 1121-22 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), however, the Supreme Court suggested that a Congressional decision to include an explicit preemption provision in enacted legislation forecloses any finding of implied preemption with respect to that legislation, as long as the provision "provides a reliable indicium of congressional intent with respect to state authority." *Id.* at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)).

The Supreme Court had an opportunity to revisit this aspect of the *Cipollone* decision in *Myrick*—this time in the context of the Safety Act. The plaintiff in *Myrick* argued that implied preemption could not exist under the

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[6] Although she fails to develop it, Plaintiff appears to make this argument against implied preemption on the first page of her response brief. (Plaintiff's Memorandum in Response to Motion for Summary Judgment Based on Federal Preemption, at 1.)

Act because Congress had decided to include an express preemption clause. 115 S. Ct. at 1487. The Supreme Court disagreed, and proceeded to address the merits of the defendants' implied preemption argument. *Id.* at 1488. Justice Thomas, writing for the Court, explained that, "at best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* Given the factual similarities between the case at bar and *Myrick* (see supra express preemption discussion), this court chooses, analogously, to reach Volvo's implied preemption argument.[7]

Having reached the merits of the implied preemption issue, this court finds that Defendant's argument is without merit because Plaintiff's common-law action does not conflict with federal law. See *Myrick*, 115 S. Ct. at 1488. First, it is not impossible for Defendant to comply with both federal and state law because, as this court has found, there is nothing in the Safety Act or its regulations which currently regulates windshield characteristics of vehicles over 10,000 pounds or of a forward-control type. The subject vehicle is expressly exempted from FMVSS 212. As FMVSS 212 imposes no windshield retention requirements for these vehicles, manufacturers

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[7] The court notes, however, that several post-*Myrick* decisions involving the National Traffic and Motor Vehicle Safety Act have reached the opposite conclusion. See *Wilson v. Pleasant*, 660 N.E.2d 327, 334 (Ind. 1995) (with regard to airbag claim, implied preemption argument precluded by existence of express preemption clause); *Tebbets v. Ford Motor Co.*, 665 A.2d 345, 348 (N.H. 1995) (same), *cert. denied*, 116 S. Ct. 773 (1996), *Heiple v. C.R. Motors, Inc.*, 666 A.2d 1066, 1084 (Pa. Super. Ct. 1995) (same).

are free to obey state standards concerning windshield resistance.[8]

Second, Plaintiff's lawsuit cannot be said to frustrate the accomplishment and execution of the full purposes and objectives of Congress. Congress' express purpose for enacting the Safety Act was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Thus, it would seem that a common law standard of care that itself promoted safety would be fully consistent with the Safety Act and FMVSS 212, not an obstacle to the achievement of Congress' purposes. Common law tort liability assists in carrying out the Congressional purpose by working to

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[8] Each of the decisions cited by Defendant addresses regulations which affirmatively apply to (rather than exempt) the vehicles in those cases. See *Pokomy*, 902 F. 2d at 1116; *Taylor*, 875 F.2d 816; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (speed of train on which common law action was based fell squarely within the federal speed limit). In contrast, there is no regulation directly applicable to the subject vehicles in the instant case. Furthermore, there was an actual conflict between state and federal law in each of the cases cited by Defendant. *Pokomy, Taylor, Kitts,* and *Wood* involved FMVSS 208, which gives manufacturers the choice of various occupant restraint systems. In each case, the court held that the Safety Act impliedly preempted the state common law claim against the automobile manufacturer for failing to equip the automobile with an airbag, by establishing safety standards that granted manufacturers the choice of installing seat belts instead of airbags. To the extent that the state law prohibited a manufacturer from exercising the choice granted to it by FMVSS 208, the state common law claim was preempted. There is no such conflict in the case at bar.

eliminate unreasonably dangerous products. *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968). In *Larsen*, the driver of a General Motors car was severely injured in a collision when the steering column of the vehicle was thrust into his head. 391 F.2d at 496-97. The driver brought suit against the manufacturer, alleging the steering column was negligently designed. *Id.* at 497. The Eighth Circuit reversed the district court's grant of summary judgment, and rejected the manufacturer's argument that the plaintiff's action should be limited by the standards in the Safety Act. *Id.* at 506. Addressing the relationship between the Safety Act's preemption clause and savings clause, the court stated:

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile and frigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the merging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability.

Id.

Given that the simultaneous compliance with FMVSS 212 and common law standards of care is not impossible with respect to the Volvo truck, and recognizing that such a common law strict liability claim does not stand as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress, this court finds no basis for finding implied preemption of Plaintiff's claim.

CONCLUSION

For the foregoing reasons, Plaintiff's claim is not preempted by federal law. Defendant's motion for summary judgment on the basis of federal preemption should therefore be denied.

ENTER:

REBECCA R. PALLMEYER
United States Magistrate Judge

Dated: March 6, 1996

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable Paul E. Plunkett. *See* FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Lorentzen v. Anderson Pest Control,* 64 F.3d 327, 330 (7th Cir. 1995).